

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHRIS BARKLEY,) No. C 10-5389 CW (PR)
Petitioner,)
v.) ORDER DENYING PETITION FOR
JAMES NUEHRING, Warden,) WRIT OF HABEAS CORPUS
Respondent.)
_____)

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions. For the reasons set forth below, the petition for such relief is DENIED.

BACKGROUND

In 2007, a Santa Clara County Superior Court jury found Petitioner guilty of possession of cocaine base for purposes of sale, consequent to which Petitioner received a sentence of nine years in state prison. This federal habeas petition was filed after Petitioner was denied relief on state judicial review.

Evidence presented at trial shows that in 2005, San Jose Police Officer Angel Mina stopped a vehicle having an expired

1 registration tag. In the car were a female driver and Petitioner,
2 who was carrying over \$700 in cash. (Ans., Ex. 7. Vol. 3 at 129-
3 136.) Based on Officer Mina's observations, the police searched
4 Petitioner's house. The search yielded two bags of crack cocaine,
5 unused plastic bags, and a further eighty-two dollars in cash.
6 (Id. at 136-161.)

7 Also presented at trial were recordings of Petitioner's
8 jailhouse telephone conversations. In these conversations,
9 Petitioner (1) asked friends and family to lie and say the money
10 or the drugs were theirs, and (2) stated that the police did not
11 find drugs on him during the vehicle stop because, "My shit went
12 up old girl's snatch," which was taken to mean that the female
13 passenger was hiding drugs in her vagina. (Id. at 216-220.) The
14 parties stipulated to the admission of eleven jailhouse telephone
15 recordings (from a total of 167), redacted to omit inadmissible
16 information. (Id. at 181-88.)

17 As grounds for federal habeas relief, Petitioner alleges that
18 (1) defense counsel rendered ineffective assistance; (2) the
19 prosecutor committed misconduct; (3) the admission of the
20 telephone recordings violated his right to due process; (4) there
21 was insufficient evidence to support his conviction for possession
22 of crack cocaine for purposes of sale; (5) the state court
23 incorrectly determined that his prior conviction was both a felony
24 and a strike; and (6) the evidence of his jail telephone
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1 conversations was not properly authenticated.¹

2 STANDARD OF REVIEW

3 A federal writ of habeas corpus may not be granted with
4 respect to any claim that was adjudicated on the merits in state
5 court unless the state court's adjudication of the claims:
6 "(1) resulted in a decision that was contrary to, or involved an
7 unreasonable application of, clearly established Federal law, as
8 determined by the Supreme Court of the United States; or
9 (2) resulted in a decision that was based on an unreasonable
10 determination of the facts in light of the evidence presented in
11 the State court proceeding." 28 U.S.C. § 2254(d).

12 "Under the 'contrary to' clause, a federal habeas court may
13 grant the writ if the state court arrives at a conclusion
14 opposite to that reached by [the Supreme] Court on a question of
15 law or if the state court decides a case differently than [the
16 Supreme] Court has on a set of materially indistinguishable
17 facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). "Under
18 the 'unreasonable application' clause, a federal habeas court may
19 grant the writ if the state court identifies the correct
20 governing legal principle from [the Supreme] Court's decisions
21 but unreasonably applies that principle to the facts of the
22 prisoner's case." Id. at 413. The only definitive source of
23 clearly established federal law under 28 U.S.C. § 2254(d) is in
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28 ¹Only Claim Five was presented on direct appeal. (Ans., Ex. 2.)
The remaining claims were presented only to the state supreme court,
which summarily denied the habeas petition.

1 the holdings of the Supreme Court as of the time of the relevant
2 state court decision. Id. at 412.

3 If constitutional error is found, habeas relief is warranted
4 only if the error had a "'substantial and injurious effect or
5 influence in determining the jury's verdict.'" Penry v. Johnson,
6 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S.
7 619, 638 (1993)).

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DISCUSSION

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I. Assistance of Counsel

10 Petitioner claims that defense counsel rendered ineffective
11 assistance in various ways. In order to prevail on a Sixth
12 Amendment ineffectiveness of counsel claim, Petitioner must
13 establish two things. First, he must establish that counsel's
14 performance was deficient, i.e., that it fell below an "objective
15 standard of reasonableness" under prevailing professional norms.
16 Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Second,
17 he must establish that he was prejudiced by counsel's deficient
18 performance, i.e., that "there is a reasonable probability that,
19 but for counsel's unprofessional errors, the result of the
20 proceeding would have been different." Id. at 694. A
21 reasonable probability is a probability sufficient to undermine
22 confidence in the outcome. Id. "The likelihood of a different
23 result must be substantial, not just conceivable." Harrington v.
24 Richter, 131 S. Ct. 770, 792 (2011) (citing Strickland, 466 U.S.
25 at 693).

1 A. Failure to Investigate

2 Petitioner claims that defense counsel failed to conduct
3 sufficient investigation. First, he claims that counsel failed
4 to investigate the validity of the vehicle registration tag on
5 the vehicle stopped by police. Petitioner fails to state what
6 such investigation would have yielded or that he had a reason
7 beyond mere speculation to doubt the validity of the vehicle
8 stop. Failure to identify such information is a failure to show
9 that trial counsel's performance was deficient, or that the
10 alleged deficiency resulted in prejudice. See Gallego v.
11 McDaniel, 124 F.3d 1065, 1077 (9th Cir. 1997).

12 Second, Petitioner claims that defense counsel failed in his
13 duty to investigate and obtain fingerprint evidence from the bags
14 containing the cocaine seized from his house. However,
15 Petitioner has not shown prejudice given the strength of the
16 evidence against him. Even if fingerprints from persons other
17 than Petitioner were on the bags, that would do little to
18 undermine the evidentiary value arising from the fact that police
19 found the cocaine in his house, and that he asked other persons
20 to lie and take the blame.

21 Third, Petitioner claims that defense counsel failed in his
22 duty to investigate the theory that Marta Gonzalez, who was found
23 in his apartment during the police search, told the police that
24 the drugs were hers. The record does not support Petitioner's
25 assertion that defense counsel's performance was deficient.

1 There is no evidence that Ms. Gonzalez told the police that the
2 drugs were hers. Indeed, she refused Petitioner's request to do
3 so.² (Ans., Ex. 1, Part 2 at 56-69.) This claim is DENIED.

4 B. Failure to State Proper Grounds

5 Petitioner claims that defense counsel failed to state
6 proper grounds for the admission of evidence. Petitioner,
7 however, does not state what grounds counsel should have used.
8 Failure to identify such information is a failure to show that
9 trial counsel's performance was deficient, or that the alleged
10 deficiency resulted in prejudice. See Gallego, 124 F.3d at 1077.
11 This claim is DENIED.

12 C. Failure to Object to Evidence

13 Petitioner claims that defense counsel failed to object to
14 the admission of the recorded telephone calls. This claim is
15 DENIED. First, Petitioner does not state what more counsel
16 should have done. Second, the record shows that defense counsel
17 acted to suppress many of the telephone recordings. He moved to
18 exclude evidence of 156 of the 167 recorded telephone calls and
19 to redact the eleven admitted recordings to omit inadmissible
20 evidence. On such a record, Petitioner has not shown a deficient
21 performance, nor articulated any facts showing prejudice.

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27 ²Petitioner states that the person found inside was a male. The
28 police found no males inside the house during the search. The police
did find one male and one female in the carport of the house.
However, there was no evidence tying them to the drugs found in
Petitioner's apartment. (Ans., Ex. 7 at 142-43, 161.)

Petitioner also claims that defense counsel failed to object to evidence that there was a low denomination of currency found in a child's piggy bank in his house. Again, Petitioner fails to explain the significance of such information and why counsel should have objected to it, let alone that the objection would have been sustained and would have resulted in a different outcome of the trial. This claim is DENIED.

D. Conflict with Counsel

Petitioner claims without elaboration that a conflict between counsel and himself resulted in ineffective assistance. Petitioner does not provide any details or supporting information. Accordingly, this claim is DENIED because it does not meet the specificity requirements of Mayle v. Felix, 545 U.S. 644, 655 (2005).

E. Jury Instructions

Petitioner claims without elaboration that defense counsel failed to craft appropriate jury instructions. Petitioner provides no details or supporting information. Accordingly, this claim is DENIED because it does not meet the specificity requirements of Felix. 545 U.S. at 655.

F. Challenging Evidence

Petitioner claims that defense counsel failed to object to the testimony that the cell phone seized by police was Petitioner's. As detailed in Section II.A. below, there was sufficient evidence to show that it was Petitioner's cell phone.

1 Any objection by defense counsel would therefore almost certainly
2 have been overruled. Because it is both reasonable and not
3 prejudicial for defense counsel to forgo a meritless objection,
4 see Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005),
5 Petitioner's claim is DENIED.
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7 Based on the foregoing, Petitioner's ineffective assistance
8 claims are DENIED.

9 II. Prosecutorial Misconduct Claims

10 Petitioner claims that the prosecutor committed misconduct
11 by (A) knowingly presenting false evidence, (B) allowing Officer
12 Mina to use a document to refresh her recollection, and
13 (C) failing to present evidence that the fingerprints of other
14 persons were found on the bags of cocaine.
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16 A defendant's due process rights are violated when a
17 prosecutor's conduct "so infected the trial with unfairness as
18 to make the resulting conviction a denial of due process."
19 Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citation and
20 internal quotation omitted). Under Darden, the first issue is
21 whether the prosecutor's conduct was improper; if so, the next
22 question is whether such conduct infected the trial with
23 unfairness. Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005).

25 A. Allegedly False Evidence

26 Petitioner claims that the prosecutor knew that Officer Mina
27 falsely testified that the cell phone was Petitioner's. The
28 record shows that there was ample evidence that the telephone

1 belonged to Petitioner. First, Officer Mina testified that
2 Petitioner had a cell phone on his person at the time of the
3 vehicle stop. (Ans., Ex. 7 at 136.) Second, Petitioner admitted
4 during a jailhouse telephone conversation that the cell phone was
5 his. (Id., Ex. 1, Part 13 at 29.) Based on this undisputed
6 record and the paucity of Petitioner's evidence, it cannot
7 plausibly be said that the prosecutor knowingly presented false
8 evidence, or otherwise committed misconduct. This claim is
9 DENIED.

10 Petitioner also claims that there is evidence that Officer
11 Mina knew him prior to the vehicle stop. Her testimony regarding
12 the stop was therefore false, according to Petitioner. However,
13 Petitioner fails to include this evidence in his filings, and the
14 Court finds nothing in the record to support this assertion.
15 Accordingly, this claim is DENIED.

16 B. Document to Refresh Memory

17 Petitioner claims that the prosecutor allowed Officer Mina
18 to refresh her memory with a document she did not prepare. The
19 record does not support this claim. Officer Mina testified that
20 she was the primary author of the document she consulted during
21 her testimony. (Id., Ex. 7 at 132.) Because there is no factual
22 support for Petitioner's claim, it is DENIED.

23 C. Failure to Disclose Fingerprint Evidence

24 Petitioner claims that the prosecutor failed to disclose
25 fingerprint evidence. To succeed on a failure to disclose

1 evidence claim, a petitioner must show that (1) the evidence at
2 issue was favorable to the accused, because it was either
3 exculpatory or impeaching; (2) evidence was suppressed by the
4 prosecution, either willfully or inadvertently; and (3) prejudice
5 ensued. Banks v. Dretke, 540 U.S. 668, 691 (2004). Petitioner
6 has not met these requirements. First, his assertion that such
7 evidence existed and that it would have been exculpatory is
8 entirely speculative. He has not, then, shown that the
9 prosecution suppressed evidence. Second, as discussed in Section
10 I.A. above, given the strength of the evidence against him --
11 cocaine found in his house and his inculpatory admissions during
12 his telephone conversations -- Petitioner has not shown
13 prejudice. This claim is DENIED.

16 III. Admission of Telephone Recordings

17 Petitioner claims that the admission of the telephone
18 conversation recordings violated his right to due process because
19 it constituted prejudicial character evidence. He also claims
20 that the jury instructions regarding those recordings violated
21 his right to due process.

23 A. Character Evidence

24 Petitioner's claim comes in two parts. Petitioner first
25 asserts that the use of this evidence violated the trial court's
26 order to exclude character evidence. A review of the record
27 shows no such order. Rather, the trial court declared there were
28 no character evidence issues to decide, the prosecutor having

1 stated he was not presenting character evidence. (Ans., Ex. 7 at
2 82.) Accordingly, the claim is DENIED on this ground.

3 To the extent that Petitioner claims that the recordings
4 constituted impermissible character or propensity evidence, such
5 claim is also DENIED. A federal habeas petitioner's due process
6 right concerning the admission of propensity evidence is not
7 clearly established for purposes of review under AEDPA, the
8 Supreme Court having reserved this as an open question. Alberni
9 v. McDaniel, 458 F.3d 860, 866-67 (9th Cir. 2006).

10 Petitioner's second contention is that the prejudicial
11 effect of the recordings outweighed their probative value. This
12 claim fails for two reasons. First, the Supreme Court "has not
13 yet made a clear ruling that admission of irrelevant or overtly
14 prejudicial evidence constitutes a due process violation
15 sufficient to warrant issuance of the writ." Holley v.
16 Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009).

17 Second, the admission of evidence is not subject to federal
18 habeas review unless a specific constitutional guarantee is
19 violated or the error is of such magnitude that the result is a
20 denial of the fundamentally fair trial guaranteed by due process.
21 See Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). Only
22 if there are no permissible inferences that the jury may draw
23 from the evidence can its admission violate due process. See
24 Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).
25 Petitioner has not shown that a specific constitutional guarantee

1 was violated or that he was denied a fair trial. First, this
2 claim was waived. Counsel stipulated to the admission of eleven
3 recordings, and those eleven would be redacted to omit
4 inadmissible evidence. Second, the jury could draw the
5 reasonable inference from the recordings that Petitioner had
6 knowledge of and control over the cocaine, and that he asked
7 others to assume criminal responsibility. On such a record, this
8 claim is DENIED.

10 B. Jury Instructions

11 Petitioner claims that the trial court violated his right to
12 due process by instructing the jury that it could find that an
13 attempt to falsify evidence can show awareness of guilt.
14 Petitioner asserts that the instruction violated his rights
15 because he never claimed to have possession of the drugs.
16 Petitioner's contention is irrelevant because such an instruction
17 was appropriate given that the recordings show Petitioner
18 attempting to persuade others to assume criminal liability for
19 the possession charges. Any impermissible prejudicial influence
20 of such evidence was undone by the instruction itself, which
21 specifically stated that evidence of consciousness of guilt
22 "cannot prove guilt by itself." (Ans., Ex. 1, Part 5 at 149.)

23 Petitioner claims that the instruction encouraged the jury
24 to infer guilt, but he was acting under duress during the phone
25 calls, rather being conscious of guilt. The instruction,
26 however, simply allowed the jury to make an inference, rather

1 than directing them to do so. Petitioner was free to argue a
2 duress defense during trial. This claim is DENIED.

3 IV. Sufficiency of the Evidence

4 Petitioner claims without elaboration that there was not
5 sufficient evidence to find him guilty beyond a reasonable doubt
6 of the possession of cocaine for purposes of sale (Cal. Health &
7 Saf. Code § 11351.5).

8 A federal court reviewing a state court conviction does not
9 determine whether it is satisfied that the evidence established
10 guilt beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335,
11 338 (9th Cir. 1992). Nor does a federal habeas court in general
12 question a jury's credibility determinations, which are entitled
13 to near-total deference. Jackson v. Virginia, 443 U.S. 307, 326
14 (1979). The federal court determines only whether, "after
15 viewing the evidence in the light most favorable to the
16 prosecution, any rational trier of fact could have found the
17 essential elements of the crime beyond a reasonable doubt." Id.
18 at 319. Only if no rational trier of fact could have found proof
19 of guilt beyond a reasonable doubt may the writ be granted. Id.
20 at 324. "[T]he only question under Jackson is whether that
21 [jury] finding was so insupportable as to fall below the
22 threshold of bare rationality." Coleman v. Johnson, No. 11-1053,
23 slip op. 7 (U.S. May 29, 2012).

24 This undetailed and conclusory claim does not meet the
25 specificity requirements of Felix. 545 U.S. at 655. Further,

1 the jury was at least twice instructed that the prosecution had
2 to prove guilt beyond a reasonable doubt. (Ans., Ex. 1, Part 5
3 at 144 & 153.) Finally, there was sufficient evidence to support
4 his conviction. Under California law,

5 [i]n order to secure a conviction of a violation of
6 Health and Safety Code section 11351, the prosecution
7 must prove beyond a reasonable doubt that (1) the
8 defendant exercised dominion and control over the
9 controlled substance, (2) the defendant was aware that
10 he or she was in possession of a controlled substance,
11 (3) the defendant was aware of the nature of a
12 controlled substance, (4) the controlled substance was
13 in an amount sufficient to be used for sale or
14 consumption as a controlled substance, and (5) the
15 defendant possessed a controlled substance with the
16 specific intent to sell it.

17 People v. Parra, 70 Cal. App. 4th 222, 225-26 (1999). There was
18 ample evidence of all five elements. As for elements one through
19 three and five, the presence of cocaine and a large amount of
20 cash in Petitioner's house and on his person, and his recorded
21 admissions, clearly show that he exercised dominion and control
22 over, had possession and understood the nature of, and had the
23 intent to sell the controlled substance. As for the fourth
24 element, counsel stipulated that police seized 4.98 grams of
25 cocaine base. (Ans., Ex. 7 at 201.) To support the assertion
26 that such amount showed that Petitioner possessed with the intent
27 to sell, there was testimony that 0.25 grams was a saleable
28 amount, and that Petitioner's apartment showed no signs that he
was a cocaine user. (Id. at 239 & 242.) This record shows that
the jury's findings were not so insupportable as to fall below

1 the threshold of rationality. Accordingly, Petitioner's claim
2 must be DENIED.

3 V. Prior Conviction

4 Petitioner claims that the trial court erroneously
5 determined that his prior conviction constituted both a felony
6 and a strike. The state appellate court found the trial court's
7 determination correct under state law, and rejected Petitioner's
8 claim. (Ans., Ex. 2 at 8.)

9 This claim fails. First, whether his prior conviction
10 constitutes a felony or a strike is a matter of state law.
11 Violations of state law are not remediable on federal habeas
12 review, even if state law were erroneously interpreted or
13 applied. See Swarthout v. Cooke, 131 S. Ct. 859, 861-62 (2011).
14 Second, even if state law violations were cognizable, this Court
15 is bound by the state appellate court's determination that the
16 prior conviction constituted a strike and a felony. Bradshaw v.
17 Richey, 546 U.S. 74, 76 (2005). Petitioner's claim is DENIED.

18 VI. Authentication of Recordings

19 Petitioner claims without elaboration that the recordings of
20 his jailhouse conversations were not properly authenticated.

21 This claim fails. First, it is undetailed and conclusory
22 and so does not meet the specificity requirements of Felix. 545
23 U.S. at 655. Second, authentication of evidence is a matter of
24 state law, violations of which are not remediable on federal
25 habeas review. Third, the claim is waived because the parties
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1 stipulated to the admission of the recordings. (Ans., Ex. 7 at
2 176-18.) This claim is DENIED.

3 CONCLUSION

4 The state court's denial of Petitioner's claims did not
5 result in a decision that was contrary to, or involved an
6 unreasonable application of, clearly established federal law, nor
7 did it result in a decision that was based on an unreasonable
8 determination of the facts in light of the evidence presented in
9 the state court proceeding. Accordingly, the petition is DENIED.

10 A certificate of appealability will not issue. Reasonable
11 jurists would not "find the district court's assessment of the
12 constitutional claims debatable or wrong." Slack v. McDaniel,
13 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of
14 appealability from the Court of Appeals.
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16 The Clerk shall enter judgment in favor of Respondent, and
17 close the file.

18 IT IS SO ORDERED.

19 DATED: 9/30/2012

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21 CLAUDIA WILKEN
22 United States District Judge
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